No. 71-677

In the Supreme Court of the United States

OCTOBER TERM, 1971

JAMES MELVIN WILCOX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. An earlier opinion is reported at 387 F. 2d 60.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1971. A petition for rehearing was denied on October 20, 1971. The petition for a writ of certiorari was filed on November 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a transcript of the testimony of a witness at a prior trial was admissible into evidence at

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a retrial after the witness asserted the privilege against self-incrimination and refused to testify.

2. Whether petitioner's conviction rests upon perjurious testimony.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the Southern District of Florida of knowingly transferring and delivering five hundred counterfeit twenty-dollar federal reserve notes to Edward Maruszewski, with intent that the notes be passed, in violation of 18 U.S.C. 473 (A. 400–401).[1] On January 23, 1969, he was sentenced to imprisonment for two years subject to the parole provision of 18 U.S.C. 4208(a)(2) (A. 403–405). The court of appeals affirmed (Pet. App. A).

The issues raised here arise out of the introduction into evidence at a retrial of petitioner of a transcript of the testimony of Edward Maruszewski at petitioner's first trial in May 1966. This transcript was admitted into evidence after Maruszewski asserted the privilege against self-incrimination and refused to testify.

1. Before the third trial[2] after Maruszewski indicated that he would claim the privilege against self-incrimination and refused to review his testimony

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[1] "A" refers to the Appendix filed in the court below. A copy is being lodged with the Clerk of this Court.

[2] The conviction at petitioner's first trial was reversed because of error in the cross-examination of character witnesses. 387 F. 2d 60. A mistrial occurred at the second trial after there was a reference at the outset to the fact that Maruszewski would not testify (A. 9, 16).

with the prosecutor, the court appointed an attorney to represent and advise Maruszewski of his rights (A. 12, 21). Thereafter, at a pretrial hearing, the government informed the court that, while it would not ask the witness Maruszewski the exact questions asked at the first trial, it planned to cover the same material (A. 22). When the court asked the witness if he would refuse to testify under such circumstances, the witness replied that he would invoke the Fifth Amendment (A. 22–28). Defense counsel indicated that he would question the witness about new matters for the first time (A. 41–47).

At the time of the hearing, Maruszewski was incarcerated under a state charge and his parole from a previous three-year federal counterfeiting sentence had been revoked and a detainer was lodged against him (A. 29, 46–47, 154). On examination by defense counsel (A. 29–50), the witness said that, although the government had not informed him of any intention to prosecute him further for counterfeiting (A. 37), his attorney had advised him that he could be prosecuted for other counterfeiting crimes. He refused to state what particular prosecution for counterfeiting offenses his attorney had advised him were still possible (A. 49). The witness also refused, on the basis of privilege, to answer questions as to whether he had made a full disclosure to government authorities of all his lifetime activities connected with counterfeit monies (A. 29–30). When asked whether two statements that he gave to government investigators confessing his involvement in counterfeit activities were

false, he refused to answer (A. 39), but did say that he was "not necessarily" concerned with a possible perjury charge (A. 30). The court sustained the refusal of the witness to answer questions, holding that it would not require the witness to answer a question "which, in effect, would violate his Fifth Amendment rights" (A. 49, 51). It also did not require the government to state whether it intended to prosecute the witness "for any crime that might be involved as a result of his testimony" (A. 51–52).

At the conclusion of the hearing, the trial court ruled that the witness was unavailable and that his testimony at the prior trial could be introduced into evidence (A. 64). It found that there was a valid basis for the claim of privilege, noting the advice of the disinterested court-appointed counsel that the witness could be subjected to prosecution for crimes were he to testify, and that the witness would "be subject to examination and cross examination".

2. In the prior trial testimony which was then introduced and read at trial, Maruszewski stated that in November 1965 in Fort Lauderdale, Florida, he accepted five hundred counterfeit $20 bills on consignment from petitioner (A. 136–141); that he, thereafter, passed some of these bills in Jacksonville and New Orleans (A. 141); and that on December 10, 1965, he was arrested in Detroit, Michigan, with some of the counterfeit money in his possession (A. 145–147). Maruszewski also stated that on December 17, 1965, he returned to Fort Lauderdale with government agent Rivers where he telephoned petitioner (A. 148–

149); that he then introduced Rivers to petitioner as "Mad Dog" at the latter's apartment; and that he then returned approximately $600 in counterfeit bills to petitioner and also gave him $380 in genuine bills as proceeds from the distribution of other counterfeit bills (A. 151–153).

At trial, agent Rivers testified about accompanying Maruszewski to petitioner's residence with the counterfeit money; he related the conversation in which Maruszewski returned the counterfeit bills to petitioner; and he told of the arrest which occurred when they left the apartment (A. 183–192). A recording of the telephone conversation between petitioner and Maruszewski on December 17, 1965, was also introduced into evidence (Gov't Exh. 5; A. 228–229, 220).

ARGUMENT

1. The trial court did not err in admitting the transcript of the prior testimony of Edward Maruszewski into evidence. The latter's refusal to testify, whether justified or not, made him "no less unavailable than death or absence from the country or physical inability to speak." *United States* v. *Mobley*, 421 F. 2d 345, 351 (C.A. 5). See also *California* v. *Green*, 399 U.S. 149, 166.

The trial court adopted a fair procedure in determining whether the witness was "unavailable." The

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[3] In addition, the government showed that it recovered thirty-two counterfeit $20 bills from Maruszewski at the time of his arrest in Detroit and thereafter obtained $5,160 in counterfeit bills from Maruszewski's home (A. 97–100).

court did not accept the mere statement of the witness that his testimony might be incriminatory, but held a hearing on this issue and appointed disinterested counsel to advise the witness. At this hearing, defense counsel was allowed to examine the witness and was advised that the government planned to cover the same ground in its questioning as it had in the previous trial. The court was told that Maruszewski's attorney had advised him that he could be prosecuted for other counterfeiting crimes and the government refused to state whether it planned any further prosecution of Maruszewski (A. 51–52).

To be sure, no harm to the witness was apparent from further testimony since he had already testified at the first trial and since he had previously pleaded guilty to counterfeiting charges. But, in *Malloy* v. *Hogan*, 378 U.S. 1, this Court upheld a claim of privilege where, in light of the defenses of double jeopardy and the statutes of limitations, no real harm was apparent.[4] Likewise, it has generally been held that a person who has waived his privilege of silence in one trial or proceeding may assert it as to the same matter in a subsequent trial or proceeding. *United States* v. *Miranti*, 253 F. 2d 135, 139 (C.A. 2); *In re Neff*, 206 F. 2d 149, 152 (C.A. 3); *Ballantyne* v. *United States*, 237 F. 2d 657, 665 (C.A. 5). Contra, *Ellis* v. *United States*,

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[4] Petitioner's reliance on *Reina* v. *United States*, 364 U.S. 507, is misplaced. In *Reina* that recalcitrant witness had not only been convicted of the crime with respect to which further testimony was sought, but had been given transactional immunity. Thus he could never be prosecuted for anything about which he testified.

416 F. 2d 791, 800–805 (C.A.D.C.); see also *United States* v. *Seewald* (C.A. 2), petition for a writ of certiorari pending, No. 71–5814. An important consideration for upholding the claim of privilege is that the passage of time, as here, might have created new grounds for apprehension and that a subsequent interrogation is always different and therefore might lead to injurious disclosures not heretofore revealed nor legally barred.

Nor was there any requirement, as petitioner asserts, for the trial court to probe further into the basis of the claim of privilege by the witness. As the court below held (Pet. App. 11), such an inquiry would have been impermissible under *Hoffman* v. *United States*, 341 U.S. 479, and *Malloy* v. *Hogan*, 378 U.S. 1, "for it in itself would force the witness to specify, identify or call attention to other crimes for which he might be charged." And, as noted, the government objected to questions relating to its plans with respect to further prosecution of the witness.

In any event the issue here is not whether the witness could properly have been found guilty of contempt for refusing to testify but whether he was an "unavailable" witness. Whether or not the judge ruled correctly on the claim of privilege, the witness was, by judicial order, rendered unavailable. In this regard, it should also be noted that a threat of contempt to induce the witness to testify probably would have had little effect here since he was at the time incarcerated under a state charge and his parole from a three year federal counterfeiting sentence had also been revoked.

2. This conviction does not rest on perjurious testimony. As pointed out in the Statement, the transcript was corroborated both by the testimony of the government agent who was present when Maruszewski returned counterfeit bills to the defendant and by a recorded telephone conversation which also demonstrated petitioner's involvement in the crime.

The discussion of perjury during the pretrial hearing (A. 14–15) was a hypothetical and abstract discussion of possibilities. It does not suggest that the government was using perjured testimony. When the witness was asked whether a possible prosecution for perjury was one of the concerns that caused him to invoke the privilege against self-incrimination, he stated "not necessarily" (A. 30).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972